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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 540

THE BLANCHARD MACHINE COMPANY, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION PRICE ADJUSTMENT BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the Tax Court (R. 175-177) is not reported officially. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 188-191) is reported at 177 F. 2d 727.

JURISDICTION

The judgment of the Court of Appeals was entered on October 17, 1949 (R. 192). The peti-

tion for a writ of certiorari was filed on January 13, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the RFC Price Adjustment Board commenced renegotiation, within the meaning of Section 403(c)(6) of the Renegotiation Act, as amended, within one year after November 30, 1942, the close of petitioner's fiscal year.

2. Whether the July 1, 1943, amendment of the Renegotiation Act, which authorized renegotiation of contracts and subcontracts with the Defense Plant Corporation and provided that "all the provisions" of the existing renegotiation legislation should be applicable, subjected to renegotiation DPC contracts and subcontracts which were completed and paid for prior to July 1, 1943, but after April 28, 1942, the date of the First Renegotiation Act.

3. Whether the July 1, 1943 amendment, as so applied, is constitutional.

STATUTES INVOLVED

The original Renegotiation Act (Sec. 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, 56 Stat. 226, 245) and its various amendments (Sec. 801 of the Revenue Act of 1942, 56 Stat. 798, 982; Sec. 1 of the Military Appropriation Act, 1944, 57 Stat. 347; the Act of July 14, 1943, 57 Stat. 564; Titles VII and VIII of the

Revenue Act of 1943, 58 Stat. 21, 78; and the Act of June 30, 1945, 59 Stat. 294, 50 U. S. C. App. 1191), with the exception of the 1945 Act, are set forth in a pamphlet entitled "The Renegotiation Act," which is being filed together with this brief and will be referred to as the statutory pamphlet. The 1945 Act, relating to the termination date of the Renegotiation Act, is not pertinent to the present case.

STATEMENT

Petitioner instituted this proceeding on May 28, 1945, by filing its petition in the Tax Court of the United States for a redetermination of the unilateral determination of the Reconstruction Finance Corporation Price Adjustment Board that petitioner's excessive profits on subcontracts with the Defense Plant Corporation with respect to its fiscal year ending November 30, 1942, amounted to $362,098 (R. 3-67). After a hearing based upon an agreed stipulation of facts, the Tax Court entered its decision for the Government, and redetermined petitioner's excessive profits in the same amount as the RFC Price Adjustment Board had determined ($362,098) (R. 175-178). On appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed (R. 188-191). The pertinent facts as stipulated by the parties may be summarized as follows (R. 77-175):

Petitioner, a corporation with its principal office in Cambridge, Massachusetts, manufactures

surface grinding machines, known as Blanchard grinders (R. 77). During its fiscal year ending November 30, 1942, petitioner sold a large number of its machines to, among other contractors and subcontractors with Defense Plant Corporation, then a subsidiary of Reconstruction Finance Corporation[1] (R. 77-78, 33, 36-38). These indirect sales to DPC were made on purchase orders which contained no provision for price adjustment or for renegotiation; and all of the sales constituting petitioner's (indirect) business with DPC for the fiscal year ending November 30, 1942, were completed and paid for prior to July 1, 1943 (the date on which the Renegotiation Act was amended expressly to cover contracts and subcontracts with the RFC subsidiaries, including DPC) (R. 77-78). Petitioner's gross sales having an end use by DPC, during the period from April 28, 1942 (the date of the original Renegotiation Act) to the end of its fiscal year (November 30, 1942), amounted to $2,003,254.29 (R. 81). Of these sales, $1,661,803.78 were attributable to contracts which were completed and paid for within that fiscal year and after April 28, 1942, and $341,450.51 were attributable to contracts made, but not paid for, within that fiscal year but completed and paid for between November 30, 1942, and July 1, 1943 (R. 81, 84). Petitioner keeps its books on the accrual basis (R. 77).

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[1] The Act of June 30, 1945, c. 215, 59 Stat. 310, dissolved Defense Plant Corporation, and the other RFC subsidiaries, and transferred all their functions to RFC.

On October 25, 1943, the RFC Price Adjustment Board sent petitioner a printed letter, received on October 27th. The letter stated that Congress by the July 1, 1943, amendment had included the RFC subsidiaries within the Renegotiation Act; that the Board understood that petitioner had transactions with certain of the RFC subsidiaries during the fiscal year ending November 30, 1942; and that it was necessary to determine whether or not excessive profits were realized therefrom.[2] The letter went on to request petitioner, in order to secure the "fairly comprehensive data" which would be required "before final determination can be made," to complete two copies of Form RFC-PAB6 (eliciting pertinent financial and accounting data) and to return them within twenty days (*i.e.*, before November 20, 1943) (R. 78-79, 86-87). Petitioner's reply of November 10th questioned whether its DPC subcontracts, which had been completed prior to July 1, 1943, could be renegotiated (R. 79, 87-88).

On November 18, 1943, in accordance with a previous telephonic arrangement, two representatives of the RFC Price Adjustment Board called at petitioner's offices and informed its assistant manager that they had been ordered officially to start renegotiation proceedings on DPC business done by petitioner for the fiscal year ended Novem-

[2] Petitioner had previously been voluntarily renegotiated on business done with the War Department in 1942 (R. 32-38, 78). This prior renegotiation is not involved in the present proceeding.

ber 30, 1942 (R. 79). On November 23, 1943, an agent for the Price Adjustment Board wrote petitioner advising that the two representatives who had called upon petitioner had "completed their report of the conference with you on November 18, 1943, for the purpose of officially starting renegotiation of your contracts and subcontracts with RFC Subsidiaries." Petitioner was informed that "as soon as it is convenient, we will continue the assignment covering the renegotiation of your contracts and subcontracts with the RFC Subsidiaries" (R. 79, 89).

On February 12, 1944, an official of the Price Adjustment Board wrote to petitioner advising that the Board construed the July 1, 1943, amendment as making renegotiable all contracts or subcontracts with DPC since April 28, 1942, the date of the original Renegotiation Act, and requesting that petitioner transmit the completed forms previously furnished them not later than March 1, 1944 (R. 79, 89-92). After securing an extension of time to March 15, 1944 (R. 92-93), petitioner supplied the requested information by letter of March 11, 1944, at the same time indicating that it still believed it was not subject to further renegotiation (R. 80, 93-94). No other information was supplied the respondent by petitioner (R. 80), and no meetings or conferences other than the meeting of November 18, 1943 (described above), were scheduled or held between representatives of the Board and petitioner, with

reference to its DPC business for the fiscal year ended November 30, 1942 (R. 79).

By letter of March 28, 1944, the Board proposed that if petitioner's 1942 DPC business had been similar to the 1942 business previously renegotiated by the War Department, a refund agreement be drawn up by which petitioner would be allowed, on its DPC business, the same percentage rate of profit to sales as had been allowed by the War Department. The refund was estimated at $362,098. Petitioner's prompt acceptance or rejection of this proposal was requested (R. 80, 94-95). Petitioner never agreed to be renegotiated on this basis, and on February 28, 1945, the Board unilaterally determined, on an "over-all" basis, petitioner's excessive profits on DPC business for the fiscal year ended November 30, 1942 to be $362,098 (R. 80, 44-46). Petitioner was duly notified of the determination (R. 80, 46-47), and the sum of $362,-098, less the appropriate tax credit, was thereafter collected by the United States, over petitioner's protest, by withholding payments on other contracts of petitioner (R. 80).

Petitioner duly filed its petition for redetermination in the Tax Court on May 28, 1945 (R. 3). Although that petition raised numerous issues (R. 3-31), petitioner in the stipulation of facts in the Tax Court specifically waived all issues, except (a) its objection that the commencement of renegotiation by the RFC Price Adjustment Board

was not timely,[3] and its contentions (b) that the July 1, 1943, amendment to the Renegotiation Act did not subject DPC business prior to that date to renegotiation, and (c) that if the amendment did so apply, it was unconstitutional (R. 85).

The Tax Court determined all issues adversely to petitioner (R. 175-177), on the authority of its decisions in *Spray Cotton Mills* v. *Secretary of War,* 9 T. C. 824 (as to timely commencement of renegotiation), and *National Electric Welding Machines Company* v. *Stimson,* 10 T. C. 49 (as to the retroactivity and validity of the July 1, 1943 amendment). Accordingly, pursuant to the stipulation, the court determined petitioner's excessive profits for the fiscal year ended November 30, 1942 to be $362,098 (R. 178).[4]

On appeal, the court below found no error in the Tax Court's rulings, and affirmed (R. 188-191). The court agreed with the Tax Court that the commencement of renegotiation had been timely, and that the July 1, 1943, amendment applied to petitioner's 1942 DPC business (R. 190). As to the

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[3] Petitioner never waived the requirement that renegotiation be timely commenced (R. 79).

[4] In the stipulation, the parties had agreed that if the Act applied and was valid, and if the renegotiation was timely commenced as to all renegotiable sales made during the fiscal year ending November 30, 1942, the amount of $362,098 was a correct determination of excessive profits (R. 81). If the Act applied and was valid, but if the renegotiation was timely commenced only as to contracts which were completed and paid for between November 30, 1942, and July 1, 1943 (*supra*, p. 4), it was agreed that the proper figure for excessive profits would be $61,718.89 (R. 81).

constitutionality of the amendment as so applied, the court adopted the views of the Sixth Circuit, passing on precisely the same question, in *Howell Electric Motors Co.* v. *United States,* 172 F. 2d 953, 954 (R. 190-191).

ARGUMENT

In this case, petitioner is attacking the validity of the unilateral determination of the RFC's Price Adjustment Board, acting under the July 1, 1943, amendment of the Renegotiation Act, that petitioner had received, for the fiscal year ending November 30, 1942, excessive profits of $362,098 on its Defense Plant Corporation business. The petition here questions (1) the timeliness of the Board's commencement of renegotiation under Section 403(c)(6) of the Renegotiation Act, (2) the application, as a matter of statutory construction, of the July 1, 1943, amendment of the Renegotiation Act to DPC contracts completed and fully paid for between April 28, 1942, and July 1, 1943, and (3) the constitutionality of that amendment as so applied retroactively. These three contentions were presented to, and unanimously rejected by, both the Tax Court and the court below. The holdings below on these issues are, we submit, plainly correct and do not warrant further review by this Court.[5]

[5] In our view, there is a grave question whether the denial by the court below of any relief to petitioner is not also supportable on the ground that the courts of appeals are without

1. *Commencement of Renegotiation.* (a) The holding below that the RFC Price Adjustment Board commenced renegotiation of petitioner's DPC business for the fiscal year ended November 30, 1942, within one year thereafter, as required by Section 403(c)(6) of the applicable Renegotiation Act (statutory pamphlet, p. 12), is sound. By November 30, 1943, the critical date, the Board had (on October 25, 1943) informed petitioner of its understanding that petitioner had renegotiable business with an RFC subsidiary and had made written demand on petitioner for the necessary financial and accounting data (R. 78-79, 86-87); the Board's representatives had (on November 18,

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jurisdiction to review the Tax Court's renegotiation orders on any issue, whether constitutional or non-constitutional in nature. Non-constitutional questions—such as the timely commencement of renegotiation, and the retroactive application of the July 1, 1943, amendment as a matter of statutory interpretation—are part and parcel of the determination of excessive profits, and hence would seem to be within the Tax Court's "exclusive jurisdiction, by order, to finally determine the amount, if any, of such excessive profits." Section 403(e) of the Second Renegotiation Act (statutory pamphlet, p. 37). Review of the Tax Court's ruling on constitutional issues may also be foreclosed by the terms of the statute, which does not provide for any review, and by its legislative history. This conclusion is borne out by the special status of the Tax Court in renegotiation matters, and the awkwardness of fitting review of Tax Court renegotiation orders into the review scheme of Sections 1141 and 1142 of the Internal Revenue Code, which govern appeals from the Tax Court in tax cases. The Court of Appeals for the District of Columbia Circuit has, however, held that it has power to review Tax Court renegotiation decisions on matters going to the Tax Court's jurisdiction, or to the validity of the Renegotiation Act, but not on questions of "amount". *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134; instant opinion, R. 189; *Ring Construction Corp.* v. *Secretary of War*, C.A.D.C., No. 9976, decided November 7, 1949.

1943) informed petitioner at an oral conference "that they had been ordered to start officially renegotiation proceedings on" 1942 DPC business (R. 79), and petitioner had (on November 23, 1943) been sent a letter informing it that renegotiation proceedings had officially been started (R. 78, 89).

These actions taken by the Board are, we submit, clearly sufficient to commence renegotiation within 403(c)(6). *Spray Cotton Mills* v. *Secretary of War*, 9 T.C. 824, 833. The normal meaning of the requirement of 403(c)(6) that renegotiation must be commenced within a year after the close of the pertinent fiscal year is that the Board must within that period definitely begin the process of examining the contractor's profits for excessiveness and thereby give the contractor notice of the Board's intention so to review his profits—a notice which was here given by the letter of October 25, underscored by the conference of November 18, and confirmed by the letter of November 23. This construction is fortified by the legislative purpose in adopting the two time limitations on renegotiation (Sections 403(c)(5)[6] and 403(c)(6)), which were proposed and drafted by the chief renegotiating agencies. These time limita-

[6] By Section 403(c)(5) (statutory pamphlet, p. 11), a contractor had the opportunity to start the running of a one-year "statute of limitations" by voluntarily filing with the pertinent renegotiating agency "statements of actual costs of production and such other financial statements for any prior fiscal year or years of such contractor or subcontractor, in such form and detail, as the Secretaries shall prescribe by joint regulation."

tions were provided for the double purpose of affording the overburdened agencies adequate time to start their work of recapturing excessive profits, at the same time that the contractors were given a definite date after which they could plan their future operations without having to fear that one of the agencies would commence renegotiating their past profits. See Hearings before a Subcommittee of the Senate Committee on Finance, 77th Cong., 2d sess., on Sec. 403 of Pub. Law No. 528 (September 29, 30, 1942), pp. 21, 53, 55, 61. Under the construction adopted below (R. 190), these purposes are fulfilled, consistently with the statute's terms, by giving the agency one year to give unequivocal notice of intention to renegotiate (under 403(c)(6)), but permitting the contractor to hasten the process, if he desires, by voluntarily filing the requisite information before expiration of the year (under 403(c)(5)).

(b) Petitioner, however, urges that the "commencement of renegotiation" under 403(c)(6) should be construed to have the same meaning as "renegotiation commenced" in 403(c)(5). The latter section requires that after the contractor has voluntarily filed all the prescribed financial data, the Secretary then has one year in which to give notice, fix a time and place for, and hold, an initial conference, and it proscribes future renegotiation unless "renegotiation" is "commenced" within this period. Under this construction, renegotiation

would not be timely commenced under 403(c)(6) until there was a meeting devoted to discussing the extent of the contractor's excessive profits, after all the relevant information had been gathered, sifted, and preliminarily adjudged by the renegotiating agency—and all this within one year after the close of the contractor's fiscal year.

Such a construction would impose a tremendous administrative burden on the agencies, defeat the congressional purpose, and make no sense of the difference between the mandatory time limit of (c)(6) and the voluntary-filing time limit of (c)(5). For, on petitioner's view, the agencies would have a substantially longer time when information was volunteered under (c)(5), than when the data was refused on official demand and (c)(6) alone applied. Moreover, whenever a contractor (like petitioner) refused information, the agency would be required, in order to prevent the limitations bar from being imposed, (1) to take the drastic step, contrary to the Act's basic idea of cooperation between renegotiating agencies and war contracts, of instituting judicial proceedings under Title XIII of the Second War Powers Act, (2) to carry these proceedings, including appeals, to a successful completion, and (3) to collect and digest the appropriate information—all within one year. Certainly Congress—and the renegotiating agencies which drafted and proposed these time-limit sections in October 1942—cannot have intended to

place such an impossible task upon the already overburdened renegotiating agencies.

Petitioner's disregard of these significant considerations, in favor of the technical argument stemming from the use of the words "renegotiation" and "commenced" in both (c)(5) and (c)(6), is peculiarly inapposite in reading the Renegotiation Act. That Act was "somewhat crude in its initial statutory simplicity" (*Lichter* v. *United States*, 334 U. S. 742, 766), and although it became more precise as it was amended, it still contains, even in its final and most complex form (*i.e.*, Title VII of the Revenue Act of 1943), lacunae and textual difficulties, which warn against reading it as a textually integrated and precisely drawn statute.[7] Particularly with such a statute, the "natural presumption" that the same words are intended to have the same meaning "readily yields" in face of the clear purpose of the time limitation sections, the conflicting manner in which these provisions would operate under petitioner's theory, and the ensuing enormous drag on the entire administration of the Act. Cf. *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 433.

Finally, it should be noted that, except for a

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[7] For instance, the statute is silent as to appeal to the courts of appeals, and, if these courts have jurisdiction, the general provisions of the Internal Revenue Code regarding appeals from the Tax Court can apply only awkwardly to a renegotiation case. *U. S. Electrical Motors, Inc.* v. *Jones*, 153 F. 2d 134, 137. See fn. 5, *supra*, pp. 9-10.

short period of less than two months, the renegotiating agencies consistently interpreted 403(c)(6) to require no more than an unequivocal beginning of the process of renegotiation by a request for pertinent information. See R. 82-83; Joint Renegotiation Manual (January, 1944) Sec. 342.2. And to this must be added the weight of the Tax Court's interpretation. Accordingly, if there be any doubt as to the construction to be given (c)(6), the long-continued administrative practice must swing the balance, especially where, as here, the chief renegotiating agencies proposed and drafted the particular provisions. *United States* v. *American Trucking Ass'ns, Inc.*, 310 U. S. 534, 549; cf. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U. S. 295, 315; *Adams* v. *United States*, 319 U. S. 312, 314-315; *Edward's Lessee* v. *Darby*, 12 Wheat. 207, 210.

2. *Retroactivity of the July 1, 1943, amendment.* (a) *Construction:* Contrary to petitioner's suggestion (Pet. 21-22), it is plain on the face of the July 1, 1943, amendment (statutory pamphlet, p. 15) that it was designed to apply retroactively to DPC contracts completed and fully paid for prior to the date of the amendment but after April 28, 1942.[8] Such was the purpose of the new subsec-

[8] Independently of the July 1, 1943, amendment, petitioner's DPC business may well have been renegotiable as subcontracts under prime contracts with the War Department, the Navy Department or the Maritime Commission—the original renegotiating agencies—and therefore renegotiable under the terms of the first Renegotiation Act of April 28, 1942. Although the RFC did not itself believe that its subsidiaries'

tion (k), added by that amendment, making applicable to DPC and the other named RFC subsidiaries, "all the provisions" of the existing Renegotiation Act, one of which (Section 403(c)(6), as amended by the Act of October 21, 1942) provided *inter alia* that the Act—

> * * * shall be applicable to all contracts and subcontracts hereafter made and to all contracts and subcontracts heretofore made * * * unless (i) final payment pursuant to such contract or subcontracts was made prior to April 28, 1942 * * * [statutory pamphlet, pp. 11-12].

To construe subsection (k) not to operate to make the July 1 amendment retroactive to April 28, 1942 would involve completely disregarding the phrase "all the provisions" and, indeed, would result in making subsection (k) redundant. If Congress had intended the amendment to apply only to those DPC contracts which were still executory on July 1, 1943, and not to those agreements on which final payment had been made prior thereto but since April 28, 1942, the amendment of Section 403(a) to include the various RFC subsidiaries in the definition of "Secretaries" alone would have been adequate. *United States*

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contracts were so renegotiable (R. 103-104), there were other government officials concerned with renegotiation who took the other side of the discussion (R. 121-122, 127-130, 133, 134). See "Joint Statement by the War, Navy and Treasury Departments and the Maritime Commission," dated March 31, 1943, p. 12.

v. *Howell Electric Motors Co.*, 78 F. Supp. 627, 630 (E.D. Mich.), affirmed, 172 F. 2d 953 (C.A. 6); *National Electric Welding Machines Co.* v. *Stimson*, 10 T.C. 49, 56-58.

The provision in the amendments of October 21, 1942, and July 14, 1943, that they be "effective as of April 28, 1942," affords no support for petitioner's contention that the absence of such provision in the July 1 amendment negatives its retroactive application (Pet. 22), for, we submit, no analogy can be drawn between these situations.[9] The October 21 and July 14 amendments altered substantive parts of the Act which in themselves were not retrospectively worded and therefore, in order to make these amendments applicable as of April 28, 1942, it was necessary to include an express provision to that effect. The July 1 amendment, however, made no change in the substantive renegotiation provisions; all that amendment did

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[9] The October 21, 1942, amendment *inter alia* retroactively subjected Treasury Department contracts and subcontracts to renegotiation "effective as of April 28, 1942." The July 14, 1943, amendment, which was enacted only two weeks after the July 1, amendment, was expressly made retroactive to April 28, 1942, with respect to certain contracts for "fees and compensation in connection with the negotiation of war contracts," which had not theretofore been covered (in the opinion of many). The express retroactivity of these amendments demonstrates the unsoundness of petitioner's inference, based on statements of Representative Case, made in connection with the original Renegotiation Act (88 Cong. Rec. 3137) and his proposed amendment here (89 Cong. Rec. 6165-6166), that the members of Congress generally believed that Congress could not validly include within the Act's coverage contracts which were fully completed and paid for prior to the date of the enactment of the particular amendment (Pet. 8).

was to extend the coverage of the original Act. Hence, for the RFC subsidiaries to function as renegotiating agencies after July 1, 1943, as to both prior and subsequent business, it was sufficient, in addition to including the RFC subsidiaries in the definition of "Secretaries," to provide, as subsection (k) did, for the applicability of "all the provisions" of section 403(c), which already was retroactive to April 28, 1942.

In addition, the legislative history of subsection (k) shows that it was included for the precise purpose of making the July 1 amendment retroactive. Although the Military Establishment Appropriation Bill for 1944, as it passed the House, authorized renegotiation by the RFC subsidiaries, that bill did not contain the critical subsection (k) which appeared for the first time after conference between the two Houses of Congress.[9a] The inclusion of that subsection was a direct consequence of a letter dated June 24, 1943, from John D. Goodloe, RFC General Counsel, to Senator Elmer Thomas, Chairman of the War Department Sub-

[9a] The amendment authorizing renegotiation by RFC subsidiaries, without subsection (k), was offered on the House floor by Representative Case; it was agreed to and passed by the House without explanation or discussion. 89 Cong. Rec. 6176. The Senate Appropriations Committee, however, deleted the entire House amendment, indicating that it "did not have time to go into the subject," (89 Cong. Rec. 6581; S. Rept. No. 357, 78th Cong., 1st sess., p. 7) and the bill passed the Senate without any provision dealing with renegotiation. 89 Cong. Rec. 6587. In conference, the substance of the House amendment was reinstated and subsection (k) was added. H. Rept. No. 520, 78th Cong., 1st sess., pp. 1-2; 89 Cong. Rec. 6828-9.

committee of the Senate Appropriations Committee which considered the House bill. That letter proposed that subsection (k) be incorporated, "if the Congress selects the date, April 28, 1942, as contained in the present statute" as fixing the date as to which "the statute is to apply to uncompleted contracts of subsidiaries of the Reconstruction Finance Corporation."[10] According to testimony of Senator Thomas, who was also chairman of the Senate conferees and of the joint conference committee, he received the Goodloe letter after the bill had been sent to conference; he read the entire letter to the conference committee, which agreed that the subsection (k) language, as suggested in the letter, should be used; and he subsequently clipped the agreed portions from the letter and personally prepared the amendment in the exact form in which it was enacted (R. 105-110, 141-142).[11] This material plainly establishes that Con-

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[10] The letter also proposed an alternative clause if Congress should desire to make the amendment prospective only. The full text of the Goodloe letter appears in Hearings before the Committee on Ways and Means, H. of Reps., 78th Cong., 1st sess., on H.R. 2324, H. R. 2698, and H.R. 3015 (Sept. 1943), pp. 200-201.

[11] Petitioner's objection to the consideration of this material, because not embodied in an official report (Pet. 24-25), is without substance, since Senator Thomas did not give his opinion of the meaning of the statute but showed how the precise question now in question was considered by the appropriate legislative committee. See *United States* v. *Dickerson*, 310 U.S. 554, 562; *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 544. The district court, in *United States* v. *Howell Electric Motors Co.*, *supra*, accepted affidavits of Senator Thomas and Mr. Goodloe, to the same effect as their testi-

gress, in adopting Mr. Goodloe's suggested language for subsection (k), understood and agreed with his statement that that subsection made the amendment retroactive to April 28, 1942.

Moreover, in testifying before the Ways and Means Committee of the House of Representatives, shortly after the amendment of July 1, 1943, Secretary of Commerce Jones, then Chairman of the RFC, stated: [12]

> The amendment suggested for use [by Mr. Goodloe] in the event the Congress wished to make subject to renegotiation the RFC subsidiary contracts under which final payment had not been made prior to April 28, 1942, was added in conference on the Military Appropriations Act of 1944. I call attention to this particularly since it seems to me to clearly evidence the intention of Congress that the amendment was to be retroactive in its application to the contracts of the four RFC subsidiaries.

Although this administrative construction was thus specifically called to the attention of the Committee then dealing with over-all revision of the Renegotiation Act, there was, and has been, no suggestion of congressional disapproval. The Second Renegotiation Act (Revenue Act of 1943,

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mony incorporated in the record here as "competent corroborating testimony," although it held the testimony unnecessary since the meaning of the July 1, 1943, amendment was sufficiently clear on its face. 78 F. Supp. at 630-631.

[12] See Hearings *supra*, fn. 10, p. 187.

Title VII, Act of February 25, 1944, 58 Stat. 21, 78-93), which eventuated from the studies of the Ways and Means Committee, did not seek to change the administrative interpretation that the July 1, 1943, amendment was retroactive. In these circumstances, it is indisputably plain that subsection (k) was designed by Congress to make the July 1, 1943, amendment retroactive to business done since April 28, 1942.

(b) *Constitutionality.* (i) Petitioner's attack on the constitutionality of the application of the July 1 amendment to contracts and subcontracts completed and fully paid for prior to July 1, 1943 [13] does not, contrary to petitioner (Pet. 26), "[arise] in this Court as an original question." This contention has already been determined in favor of the Act's validity in *Lincoln Electric Co.* v. *Forrestal,* 334 U. S. 841, decided *per curiam* on the same day as, and on the authority of, *Lichter* v. *United States,* 334 U. S. 742. Throughout the *Lincoln Electric* litigation, the contractor claimed that the Secretary of the Navy improperly included sales in the calendar year 1942 to DPC and its contractors and subcontractors, in the contractor's renegotiable business, upon which the Secretary's unilateral order there involved was based, and if the July 1, 1943, amendment did so apply, it was in-

[13] This constitutional question is reached only if renegotiation of petitioner's DPC business is dependent upon the retroactive application of the July 1, 1943, amendment. See fn. 8, *supra,* pp. 15-16.

valid. Since this Court, unlike the district court (77 F. Supp. 444, 447), decided the merits of the controversy, it determined the constitutional issues raised in regard to the July 1, 1943 amendment.

Moreover, apart from *Lincoln Electric,* petitioner's claim has no merit. The *Lichter* case has authoritatively sustained the constitutionality of the Renegotiation Act as applied retroactively to subcontracts entered into before the passage of the original statute (on April 28, 1942), but upon which final payment had not been made. 334 U.S. at 788-789.[14] The *Alexander* case (decided in the same opinion as *Lichter*) further held that certain subcontracts entered into between April 28, 1942, and October 21, 1942, could validly be renegotiated under the amendment of October 21, 1942, although the original Act might not have subjected these agreements to renegotiation. 334 U. S. at 789.

Petitioner attempts to distinguish the *Lichter* case on the ground that its "subcontracts with Defense Plant Corporation were *not executory but had been fully performed and paid for* prior to the enactment of the July 1, 1943, amendment, and *these payments had become petitioner's property*" (petitioner's italics) (Pet. 26). But "the mere circumstance that the contractor here has received full remuneration on the transactions involved is

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[14] Only subcontracts are involved in the present case; there are no contracts directly with DPC (R. 77-78, 84-85). The Sixth Circuit has upheld the July 1 amendment's validity in a case involving both prime and subcontracts. *Howell Electric Motors Co.* v. *United States,* 172 F. 2d 953.

a distinction without substance" (*Howell Electric Motors Co.* v. *United States,* 172 F. 2d 953, 954 (C.A. 6)). For this Court, in sanctioning retroactive statutes reducing contract rights—where there is a reasonable basis and a good cause for such diminution—has not rationalized the cutting off of accrued contract rights on the ground that such rights differ from property; on the contrary, this Court has upheld such legislation despite its acceptance of such contract interests as property rights. *Calhoun* v. *Massie,* 253 U. S. 170, 176; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 307-308, 309, 310; *Louisville & Nashville R. R.* v. *Mottley,* 219 U. S. 467; *Philadelphia, B. & W. R. Co.* v. *Schubert,* 224 U. S. 603; *Wright* v. *Union Central Insurance Co.,* 304 U. S. 502, 515-516; *Block* v. *Hirsh,* 256 U. S. 135; *Bowles* v. *Willingham,* 321 U. S. 503. Indeed, in so far as Federal action is concerned, contract rights are accorded constitutional protection only in so far as they are deemed property rights, since the Impairment of Contracts Clause governs state action alone. Cf. *Calhoun* v. *Massie,* 253 U. S. 170, 174-176. And as Mr. Justice Brandeis said in the *Calhoun* case "* * * the United States may, consistently with the Fifth Amendment, impose, for a permitted purpose, restrictions upon property which produce" a "serious depreciation of property values." 253 U. S. at 175.[15]

[15] An especially forceful analogy to the recovery by renegotiation of net profits realized under executed contracts is

(ii) That there was a reasonable basis for making the July 1 amendment retrospective to April 28, 1942, is easily demonstrable. By the original Renegotiation Act Congress undertook to recapture excessive profits from holders of contracts and subcontracts with named government agencies. When Congress discovered that contractors with subcontracts and contracts with the Defense Plant Corporation, an important war agency, were realizing excessive profits not clearly subject to recapture, it undertook to make it clear that it intended its general policy to apply to all DPC sales made since the date the general policy was declared. This was a reasonable course of action, both from the standpoint of protecting the public treasury and also as a measure of equalization among war contractors. In these circumstances, the reduction in the value of contractor's rights to the full payments made before July 1, 1943, no more invalidates the July 1 amendment than did the reduction in the value of the accrued rights—

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retroactive income taxation, which has long been held valid. *Spaulding* v. *Douglas Aircraft Co., Inc.*, 154 F. 2d 419, 423 (C.A. 9). See, *e.g.*, *Welch* v. *Henry*, 305 U.S. 134, 150; *United States* v. *Hudson*, 299 U.S. 498; *Cooper* v. *United States*, 280 U.S. 409, 411. The cases in which certain retrospective gift taxation had been invalidated (*Nichols* v. *Coolidge*, 274 U.S. 531; *Blodgett* v. *Holden*, 275 U. S. 142; *Untermyer* v. *Anderson*, 276 U.S. 440; *Coolidge* v. *Long*, 282 U.S. 582) (relied on by petitioner, Pet. 30) were distinguished in *Welch* v. *Henry*, *supra*, on the ground that there the donor might have refrained from making the gift had he known or anticipated the tax, but it could not be said that the taxpayer would have been deterred from receiving income by knowledge that it might thereafter be taxed (305 U.S. at 147-148).

to payments made as well as money owed—of the contractors originally made subject to renegotiation on April 28, 1942. The effective period of retroactivity in this case—at most a year and one quarter—does not exceed that often applicable under the original Act,[16] or under the rent-control, gold-clause, mortgage-moratorium or deficiency-judgment statutes, already sanctioned by this Court. See *e.g. Bowles* v. *Willingham,* 321 U. S. 503; *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240; *Home Building & Loan Association* v. *Blaisdell,* 290 U. S. 398; *Gelfert* v. *National City Bank,* 313 U. S. 221.

Moreover, in view of the controversy which took place as to whether the DPC contracts were covered by the original Act (fn. 8, *supra,* pp. 15-16), the express extension of the Act to such DPC business could hardly take DPC's contractors or subcontractors by surprise. In the view most favorable to petitioner, the July 1, 1943 amendment merely extended the reach of legislative control on a subject matter, excessive war profits, which had been the subject of prior regulation; and when petitioner made DPC sales in 1942, it made them "subject to further legislation upon the same topic." *Veix* v. *Sixth Ward Assn.,* 310 U. S. 32, 38. Such retroactivity hardly constitutes an unreasonable or arbitrary, or even an unanticipated, interfer-

[16] For example, many naval ship-construction contracts executed before March of 1941 were still in existence on April 28, 1942, and therefore subject to renegotiation.

ence with petitioner's expectations. Cf. *United States* v. *Hudson,* 299 U. S. 498, 501; *Milliken* v. *United States,* 283 U. S. 15, 22-24; see also *Illinois Central R. R. Co.* v. *Minnesota,* 309 U. S. 157, 164-5.

CONCLUSION

The holding of the courts below is clearly correct. There is no conflict of decisions. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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